AUG 22 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

Term, 1945.

No. 355

ERNEST E. SCARBOROUGH,
Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
a Corporation,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

I. LOUIS RUBIN and
B. NATHANIEL RICHTER,
510 North American Bldg.,
Philadelphia 7, Pa.,
Attorneys for Petitioner.

Martin & Lyle, 302 Penfield Bldg., Phila., Pa.

TABLE OF CONTENTS.

	PAGE
Petition for Certiorari to the United States Circuit Court of Appeals for the Third Circuit	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitution and Statute Involved	3
Statement of the Facts	4
Specifications of Error to be Urged	8
Reasons for Granting of Writ	8
Conclusion	9
Brief	10
Argument	10
I. The Court below erred in holding there was no evidence of negligence in failing to supply adequate scraping tools or in the conduct of the Plaintiff's fellow servants	11
(a) Appliances Inadequate	11
(b) Fellow Employe Negligent	15
II. The Court Below erroneously ruled in effect, that the Petitioner had assumed the risk of his employment and was thereby completely barred from recovery	18
III. The Plaintiff was entitled to a Trial by Jury	20
Conclusion	22

TABLE OF CASES CITED.

PAGE

Bailey, Admx. vs. Central of Vermont, 319 U. S. 350 ..... 8, 10, 12, 21
Balington v. Yellow Taxi Corp., 250 N. Y. 14-1928.... 12
Blair vs. B. & O. R. R. Co., 323 U. S. 600....8, 10, 12, 15, 17

Chicago & N. W. R. R. Co. v. Bowers, 241 U. S. 470.... 10
Chicago, etc., Ry. v. Krayenbuhl, 65 Neb. 889 (1902).. 12

Hill v. Winsor, 118 Mass. 251 (1875)..... 13

Ill. C. Ry. Co. v. Skaggs, 36 S. Ct. 249 (1915)...15, 17, 19
Ives vs. Grand Trunk R. R. Co., 35 Fed. 176, Affirmed 144 U. S. 408 21

Jones vs. Kans. City, So. Ry. Co., 145 S. W. 2d 969, Ark. (1941) 19
Justices vs. Murray, (N. Y. 1870), 9 Wall. 278; 19 L. E. 658 21

Pederson vs. D. & W. Ry. Co., 229 U. S. 146..... 8
In re: Polemus 3 Q. B. 560 (1921)..... 13

Reynolds v. Texas & P. Ry. Co., 37 La. Ann. 694 (1885) 14
Robostelli vs. N. Y. R. Co., (C.C.A. N. Y. 1888), 33 Fed. 796 20

Scarborough vs. Pennsylvania Railroad Company, 154 Pa. Sup. 129 (1944) 4
Sweeting v. P. R. R. Co., 142 Fed. 2d. 611, 3rd Cir.... 13

Tallgren v. Amoskeag Mfg. Co., 133 Atl. 4 (1926) N. H. 13
Tennant vs. Peoria & P. V. Ry. Co., 321 U. S. 29.....8, 10
Tiller vs. Atlantic Coast Line, 318 U. S. 54..... 19

Union Pacific Railroad Co. vs. Hadley, 246 U. S. 330, 332, 333, 38 S. Ct. 318, 319, 62 L. Ed. 751..... 17

TABLE OF AUTHORITIES.

PAGE

Corpus Juris, Master & Servant, p. 1134, Sec. 1326.... 15

Prosser on Torts, 1941, page 508..... 12
Prosser on Torts, page 222 12
Prosser on Torts, pages 222, 223 13
Prosser on Torts, pages 221, 222 13
Prosser on Torts, page 546 15

Restatement of Torts, Sec. 291 12
Restatement of Torts, Sec. 281 13
Restatement of Torts, Sec. 433, Com. (e) 13
Restatement of Torts, Secs. 292, 293 14
Restatement of Torts, Sec. 432, Com. (c) 14

TABLE OF STATUTES.

Federal Employers Liability Act as amended (45 U. S. C. 51) 3, 4, 8

Judicial Code, Section 240 (a), Amended by Act of February 13, 1925; 28 U.S.C.A., Sec. 347 (a)..... 2

Seventh Amendment to Constitution of United States 3

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1945.

No.

ERNEST E. SCARBOROUGH,
Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
a Corporation,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Ernest E. Scarborough, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled case on May 24, 1945.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is not reported.

The opinion of the United States Circuit Court of Appeals (R. 67) is reported in 149 Fed. 2d, 636.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 24, 1945 (R. 67). The jurisdiction of this Court is involved under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U.S.C.A., Sec. 347 (a).

QUESTIONS PRESENTED.

1. Whether the Third United States Circuit Court of Appeals erred in holding there was no issue of fact for the jury's consideration as to whether Respondent complied with its common-law and statutory duty to provide Petitioner with reasonably safe and sufficient tools and appliances with which to perform his work?

2. Whether the Third United States Circuit Court of Appeals erred in holding there was no issue of fact for the jury's consideration as to whether Respondent complied with its common-law and statutory duty to provide Petitioner with reasonably sufficient and skillful fellow servants to perform the work?

3. Whether the Third United States Circuit Court of Appeals erred in holding there was no issue of fact for the jury's consideration as to whether Respondent was negligent in that the Petitioner's fellow servants failed to properly and adequately remove the rust from the beam at the point where the lighting fixture was to be attached by the Petitioner?

CONSTITUTION AND STATUTE INVOLVED.

The Seventh Amendment to the Constitution of the United States which in its pertinent parts provides:

> "In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

The Federal Employers Liability Act as amended (45 U.S.C. 51) which provides in part:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

STATEMENT OF THE FACTS.

This was an action brought by Ernest E. Scarborough under the Federal Employers Liability Act (45 U.S.C.A., Sec. 51, et seq.), and its amendment of 1939, for damages suffered by reason of injury to him on April 21st, 1941, while engaged in interstate commerce in the employ of the Pennsylvania Railroad Company.

The case, after issue joined, was tried before the Hon. George A. Welsh, presiding in Philadelphia for the Eastern District of Pennsylvania, and a jury. At the conclusion of the petitioner's evidence, the respondent moved for binding instructions in favor of the respondent under Rule 50 of the Rules of Civil Procedure; the motion was granted, with exception thereto, taken by the petitioner.

The petitioner appeals to this Court from judgment entered by the Court below on November 27th, 1944, which provided as follows:

"Granting judgment for defendant with costs" as a directed verdict at the request of the defendant.

Ernest E. Scarborough began to work for the Pennsylvania Railroad Company in 1918 and worked continuously for it up to April 21, 1941, the date of the accident (R. 9). He is married and has two sons and lives in Andalusia, Bucks County, Pennsylvania (R. 9). As a result of the accident he was away from his employment until September, 1941 (R. 35).

He is a switchman employed in the Signal Department and, in the course of his duties, installs electric fixtures (R. 10). At the time of the accident, he was engaged in interstate commerce. *Scarborough vs. Pennsylvania Railroad Company,* 154 Pa. Sup. 129 (1944).

On April 21, 1941, as for several days previous, the plaintiff had been working with Underdown and McLaughlin, two fellow-employees, renewing the station lighting fixtures

at the West-bound station at Bryn Mawr, Pennsylvania (R. 13), *under a foreman named Frankenfield* (R. 10). The petitioner merely acted as leader among the three men doing the actual work (R. 10), i.e., Scarborough, Underdown and McLaughlin.

The men were sent to this station where they were supposed to remove all the old cable and light fixtures, clean the metal beam to which the cable was attached, of all rust, and reinstall new cable and lighting fixtures (R. 14). On the day in question, there were three fixtures that were to be renewed in toto, as above described (R. 11).

The men arrived by train at 9:00 A. M., at Bryn Mawr. The railroad delivered by truck the materials, appliances, supplies and the tools with which to perform the job (R. 13). *The tools necessary for this job were supposed to be selected and designated by the foreman, Frankenfield* (R. 16, 17). *Furthermore, the inspector who ordered the job done originally, knew what tools and supplies the job required* (R. 15).

An examination of the tool box delivered to the men on April 21, 1941, by the respondent (R. 13), revealed that there was no wire brush (R. 16), nor scraper, *the usual tools for cleaning or scraping rust,* in it (R. 14, 15), *nor any other tool for that purpose.*

An absolute prerequisite to the rewiring of these electric fixtures was, that the beam be cleaned and scraped free of all rust so as to prevent quick deterioration of the new fixtures (R. 14, 16, 17, 49, 50).

During the morning of April 21, 1941, all three men had worked at removing the old wire on lights 1 and 2, cleaned the girder over those two lights of rust and otherwise prepared those two lights for the hanging of fixtures on them. In addition, the cable had been strung over the girders from the No. 2 light to the No. 3 light, but it had not yet been put in place, as the old wire had not yet been taken down from No. 3 light, nor had the beam as yet been cleaned of rust around that light (R. 22, 23).

In cleaning the beam around No. 1 and No. 2 lights, the men had used an old broom and some waste found by the petitioner in a nearby tower (R. 14), because the usual sharp edge or cutting tools for the removal of rust had either not been ordered by Frankenfield, their foreman, or the inspector or the maintenance and supply departments had failed to ship them (R. 14), if ordered.

In the cleaning of the beam of rust around No. 1 and No. 2 lights, the men all used goggles (R. 18), supplied by the railroad for scraping operations as directed by Section P of Rule 8651 for eye protection (R. 62).

In the afternoon the petitioner went to No. 1 and No. 2 lights and personally hung the fixtures on them because of the graver responsibility involved in that work and the danger of damage to railroad property if they were not properly spliced into place (R. 18).

While hanging the fixtures, 1 and 2, after the beam near them had been cleaned of rust, Scarborough did not wear his goggles as there is generally no eye hazard in that work (R. 21). Nothing untoward happened while Scarborough hung fixtures Nos. 1 and 2.

In the afternoon, while Scarborough hung the fixtures on No. 1 and No. 2 lights, *Underdown* and *McLaughlin* undertook to remove the old cable running from No. 2 to No. 3 and *to clean the beam around No. 3 of all rust*, and otherwise prepare No. 3 light for the petitioner to come over to later and there hang its light fixture (R. 22, 47).

The petitioner spliced the wires for the fixtures on No. 3 and was putting the cover over the receptacle box, when by that slight simple operation, rust and dirt were dislodged from the *supposedly previously cleaned beam*, and some particles went into his eye (R. 22).

The petitioner was not wearing his goggles during this operation, for the same reason that he did not wear them when performing the similar operation at No. 1 and No. 2, namely that he thought his fellow-employees had properly cleaned the beam of all scaly rust (R. 23).

Not only did the dirt and rust come down on the peti-

tioner's face and some into his eye, but some of it in flakes was still above the cable and on the girder above the box (R. 22) after the accident.

The petitioner immediately complained to a fellow-employee about the occurrence as he descended from the ladder (R. 25). As a result of the lodging of foreign particles in the petitioner's eye, infection quickly set in and he has permanently and totally lost the sight of his right eye (R. 32).

Petitioner's Complaint (R. 4) averred insufficiency of tools and appliances with which to do the work; inadequate help and the negligence of fellow-employees in failing to properly remove the rust from the beam or, to the alternative, to warn the Petitioner thereof.

At the trial the Respondent moved for and was granted a directed verdict at the close of the Petitioner's case.

The Petitioner appealed to the Third United States Circuit Court of Appeals at Philadelphia which, per curiam, affirmed the action of the trial judge, without discussion of the issues.

By this action, the Circuit Court affirmed the ruling below, that the evidence on whether the master performed its common-law and statutory duty of supplying adequate and proper tools and appliances and whether the petitioner's fellow-employees were guilty of actionable negligence was not sufficient to justify submission as issues of fact to the jury.

Furthermore, it affirmed the rulings thereon made by the trial judge, who in commenting on his ruling, clearly showed that he based it on (1) an erroneous understanding of the effect of Petitioner's contributory negligence (if any), and (2) a wrongful application of the doctrine of assumption of risk which had been removed as a defense by the Amendment of 1939 prior to the occurrence of this accident (R. 58-62).

SPECIFICATIONS OF ERROR TO BE URGED.

1. In entering judgment for Respondent.

2. In failing to reverse the Trial Court's order granting judgment for the Respondent.

REASONS FOR GRANTING OF WRIT.

1. Petitioner's Constitutional guarantee of trial by jury has been violated.

2. The decision of the United States Circuit Court of Appeals (Third) is in direct conflict with the decisions of this Court, as expressed in *Blair vs. B. & O. R. R. Co.*, 323 U. S. 600; *Bailey, Admx. vs. Central of Vermont*, 319 U. S. 350; *Pederson vs. D. & W. Ry. Co.*, 229 U. S. 146; *Tennant vs. Peoria & P. V. Ry. Co.*, 321 U. S. 29.

3. This is the first case presented to the Court for interpretation of the Federal Employers Liability Act after the Amendment of 1939 withdrawing assumption of risk as a defense as it applies to *non-operating* railroad employees, who by the other Amendment of 1939 have had withdrawn the protection of local workmen's compensation laws and whose causes of action will in each instance be predicated upon the sufficiency of the evidence to establish negligence (a) in that the railroad failed to provide a safe place to work or to supply proper and adequate tools, appliances and men for the work to be done or (b) that a fellow-employee was careless.

CONCLUSION.

The writ should be granted.

Respectfully submitted,

ERNEST E. SCARBOROUGH,
By B. NATHANIEL RICHTER and
I. LOUIS RUBIN,
Attorneys for Petitioner.

BRIEF.

ARGUMENT.

Non-operating employes most frequently sustain injury by acts of omission rather than commission. Accidents occur because the railroad fails to supply these employes with a safe place to work, proper appliances, adequate help, or because of the non-performance of a duty by a fellow employe. It is only the occasional case where one of this class of employes can point to a specific act of commission as the efficient cause of injury. Even in that exceptional instance, it is usually merged with other acts of omission.

This Court, in *Bailey v. Central Vt. Ry.*, 319 U. S. 35, *Tennant v. Peoria & P. U. Railway Co.*, 321 U. S. 29, and *Blair v. B. & O. R. R. Co.*, 323 U. S. 600, has held that whether these acts of omission constitute negligence is exclusively for jury determination.

Nevertheless, trial courts are troubled again and again by that part of the decision in *Chicago & N. W. R. R. Co. v. Bowers*, 241 U. S. 470, which we have herein italicized.

> "The rule of law is: that the employer is under a duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employe, *but it is not required to furnish the latest, best and safest appliances, provided those in use are reasonably safe and suitable.*" (Italics ours.)

This last phrase is frequently interpreted below as meaning that that issue is one of law rather than of fact. Evidence to establish the proper tool, the safe procedure, and the manpower needed for the job has therefore been repeatedly excluded.

Despite the BLAIR decision, supra, there have since been three decisions in state appellate courts as well as several in the United States District Courts so ruling. It was so ruled in the instant case.

If the thousands of non-operating employes now embraced by the Federal Employers Liability Act are to be benefited by the 1939 amendment eliminating assumption of risk in all its corollary phases as a defense, and if they are to be provided with the superior protection intended by the Federal Employers Liability Act, a directive in unmistakable language must issue from this Court to those below so stating.

I. THE COURT BELOW ERRED IN HOLDING THERE WAS NO EVIDENCE OF NEGLIGENCE IN FAILING TO SUPPLY ADEQUATE SCRAPING TOOLS OR IN THE CONDUCT OF THE PLAINTIFF'S FELLOW SERVANTS.

(a) Appliances Inadequate.

The Petitioner herein contends that the evidence established that the defendant, by its foreman, Frankenfield, failed to order the tools necessary to perform the designated task, or, if Frankenfield did order the necessary tools, then the supply department failed to include tools for cleaning the beams of rust in the shipment it sent by truck to this job.

The Petitioner and the others came to the job by train. The usual practice was to have all supplies, material and tools waiting for the men when they arrived. No tools for scraping the rust were included in the supplies. So important was it to clean the beams of rust before putting in the new cable that the petitioner went to a nearby tower to see if he could find something with which to remove the

rust. He found an old broom and some waste and decided to try to make them do.

It is elementary hornbook law that even at common law, and before the Employers Liability Cases, a master had always been under a duty to use reasonable care to provide his servants reasonably safe appliances, tools and equipment with which to work. *Prosser on Torts*, 1941, page 508.

Quite beyond dispute, also, is the recognition of the continuance of the duty to provide reasonable tools for the work performed, under the Federal Employers Liability Acts. *Blair v. B & O R. R. Co.*, 323 U. S. 600; *Prosser on Torts*, page 508; along with the duty to use reasonable care to provide a safe place to work. *Bailey vs. Central Vt. Ry.*, 319 U. S. 350 (1943); 45 U.S.C.A. 51, paragraph 309.

The sole ground for contention here, as always, regarding the propriety of imposing liability under the rule requiring a master to provide reasonable tools, springs from the ever elusive character of the duty to use "reasonable" care. Wisely, the Courts have always eschewed arbitrary, rigid or mechanical standards for determining the existence of negligence, and have declined to make any one factor conclusive of the presence or absence of "due care". Instead, Courts have approached each negligence case on its own merits, weighing factor against factor.

The essential aim of the Courts' evaluation of particular circumstances in particular cases has been, and is, to determine whether the actor's conduct is of sufficient value and moment to justify the particular risks to which the conduct gives rise. If the risks outweigh the utility of the conduct, if the "game is not worth the candle", the actor has not exercised "due care". *Prosser on Torts*, p. 222, and cases there cited; *Restatement of Torts*, Sec. 291; *Chicago, etc., Ry. v. Krayenbuhl*, 65 Neb. 889 (1902). Negligence is "relative to the need and the occasion", Cardozo, C.J. in *Balington v. Yellow Taxi Corp.*, 250 N. Y. 14—1928; and is

determined by balancing the risk of harm against the utility of the actor's conduct. *Prosser,* pp. 222, 223.

Given conduct whose risks outweigh its utility, it matters not that the *precise* way in which harm occurs is unforeseeable, *Hill v. Winsor,* 118 Mass. 251 (1875); In re: *Polemus* 3 Q. B. 560 (1921) *Restatement of Torts,* 281, illustration one; Sec. 433 com. (e), 435; that the extent of the harm is not foreseeable; *Restatement of Torts,* 281, illustration one and Sec. 433, com. (e); that the precise *nature* of the harm is not foreseeable; In re: *Polemus* 3 Q. B. 560 (1921); nor indeed that the harm *itself* was not foreseeable, or probable, *Prosser on Torts,* pp. 221, 222, and cases in footnote 13.

As was said in *Tallgren v. Amoskeag Mfg. Co.,* 133 Atl. 4 (1926) N. H.:

> "Danger consists in the risk of harm as well as the likelihood of it, and a danger calling for anticipation need not be of more probable occurrence than less. If there is some probability of harm sufficiently serious that ordinary men would take precautions to avoid it, then failure to do so is negligence. That the danger will more probably than otherwise not be encountered on a particular occasion does not dispense with the exercise of care."

To this same effect, see *Sweeting v. P. R. R. Co.,* 142 Fed. 2d 611, 3rd Cir.

The extent of the chance that harm will result, the extent of the harm that may be occasioned, if any results at all, the number of persons endangered, the value put by society and the law upon the interests imperiled, and the ability of the actor to carry on his activity in another and less dangerous way, these are all factors to be weighed against the value of the actor's conduct and the likelihood of the

realization of that value. *Restatement of Torts,* Sec. 292, 293.

It is submitted that judged by these standards, the failure of respondent to supply the workmen in this case with a wire brush *was* unreasonable. No claim is advanced by respondent that its conduct in failing to provide the brushes involved any utility or benefit to the company. Indeed, it is conceded that respondent, although failing to provide them, *had* such brushes available and regarded their *use* as *beneficial* to its own interests. The only possible utility in failing to provide the brushes would be to permit respondent to indulge in indifference. On the other hand, failure to provide the brushes added to the peril that the eyes of any of three employes might be seriously hurt.

Nor is it of moment that rust specks *might* have entered petitioner's eyes anyway; *Reynolds v. Texas & P. Ry. Co.*, 37 La. Ann. 694 (1885); *Restatement of Torts,* Sec. 432 Com. c. It is enough that respondent's failure to provide the brushes materially bore on the result. Id. Neither is it significant, as contended by respondent, that it usually supplied the brushes only in order to facilitate the employer's work and better to paint the iron work. The question of respondent's negligence does *not* turn on *why it* chose in the past to supply the brushes. Even if it had never supplied brushes for the purpose of protecting its employes, the question is whether in the exercise of reasonable care the respondent was not bound to provide the brushes for their benefit. It is submitted that on balancing the risks inherent in failure to supply the brushes as against the possible utility therein, reasonable men would concede the "game was not worth the candle".

In the instant case, petitioner was lawfully on the premises as an employe. Respondent knew its employes were to work on rust, and yet failed to provide brushes which were not only inexpensive, but readily available. Under such circumstances, it would seem that the risks inherent in the failure to provide the brushes were far out of proportion

to any utility to be found in respondent's conduct, and that it was clearly negligent.

But even assuming, pro arguendo, that reasonable men might differ on whether the respondent exercised reasonable care, despite the failure to provide the brushes, it is submitted that, at least, a jury issue has been made out, entitling petitioner to go to the jury, and that the jury should have been permitted to decide if failure to provide the brushes was negligence. There is well established authority that it is generally a question for the *jury* whether an employer is negligent in failing to provide suitable tools and appliances: *Corpus Juris, Master & Servant,* p. 1134, Sec. 1326; and cases cited in footnotes 42 and 43 thereto.

In the case of *Blair v. B. & O. R. R. Co.,* supra, the railroad actually provided *some* tool with which to perform the designated task. The Court held, that it was for the jury to say whether that tool was adequate performance of its obligation. In our case, therefore, a'fortiori, it should be for the jury, where the railroad supplied *no tool at all* with which to perform a task which it specifically directed the petitioner and fellow employes to do.

(b) Fellow Employe Negligent.

Whatever the common law on the subject, it is now well established that an employe of a carrier may recover from the latter for harm suffered because of the negligence of fellow servants. *Prosser on Torts,* p. 546 and cases there cited; *Ill. C. Ry. Co. v. Skaggs,* 36 S. Ct. 249 (1915).

Should we assume, pro arguendo, that those entrusted with removing the rust over light No. III had been provided with the necessary means to satisfy the legal requirements, the evidence reveals that as soon as Scarborough applied the slightest pressure to the surrounding beam area, a mass

of more rust and dirt was dislodged. Was it not for a jury alone to say whether the beam cleaning job had been done carefully or negligently?

The petitioner personally did not clean this beam. At no time did he participate in that function. It was a function belonging exclusively to another, for whose conduct the railroad was responsible, that caused the petitioner's injury.

The jury alone must therefore under this evidence pass on whether that function had been carefully performed.

We consider it important to emphasize that the evidence does not indicate merely that a single speck of rust or dust was dislodged by the operation in which the petitioner was injured. It indicates rather that after the petitioner washed his eye, at the station and at home, there was only one particle of rust *remaining* in his eye. It was this one, of many particles of rust and dust, that the fellow employes carelessly overlooked and which showered the petitioner, that caused him to lose his eye.

At page 22R, the petitioner did say:

> "I hung the fixture, made the splice and finished taping it. I was just about to put the box cover up against the box when I felt rust and dirt coming off the box into my eye. Of course, I glanced up to see where it came from, and there was still some flakes above the cable and on the girder above the box."

As was argued above, if those means were inadequate for the performance of the job, then therein lay the negligence of the railroad in failing to provide adequate tools for a job it directed to be done, and the exact measure of which it was or should have been aware of. If those means were adequate, then the failure to completely remove the rust was proof of bad work by the petitioner's fellow employes.

Under the circumstances, respondent finds itself on the horns of a dilemma of its own making. If respondent did not supply reasonable tools, it is negligent on the reasoning above. If adequate tools *were* supplied for removing the

rust, then obviously the two employes previously directed to clean the rust from the metal beam were clearly remiss in their duty. If they had adequate tools for the purpose, as contended by respondent, then petitioner was reasonably entitled to rely on their proper performance of their assigned duty, especially since the first two lights were properly cleaned. Where two or more employes are working together, each has a reasonable latitude in relying upon the statements and conduct of the others in the course of the operation or a part of it: *Ill. C. Ry. Co. v. Skaggs*, 36 S. Ct. 249, 240 U. S. 66 (1915).

The two elements of negligence here alleged are necessarily intertwined and mutually complementary and fit accurately within the words of this Court when through Mr. Justice Black in *Blair vs. B. & O. R. R. Co.*, 323 U. S. 600, at pages 602, 603 it said:

"The negligence of the employer may be determined by viewing its conduct as a whole. *Union Pacific Railroad Co. vs. Hadley*, 246 U.S. 330, 332, 333, 38 S. Ct. 318, 319, 62 L.Ed 751. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others."

In *Union Pac. R. Co. vs. Hadley*, 246 U.S. 330, the following was said:

"On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling on each. But the whole may be greater than the sum of its parts and the court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question."

It is, therefore, respectfully submitted that under basic rules of negligence, the failure of the defendant to provide brushes, created risks out of proportion to every benefit

from such failure, and that plaintiff established a showing of negligence sufficient at least to be entitled to go to the jury as to inadequacy of tools and negligence of fellow servants.

II. THE COURT BELOW ERRONEOUSLY RULED IN EFFECT, THAT THE PETITIONER HAD ASSUMED THE RISK OF HIS EMPLOYMENT AND WAS THEREBY COMPLETELY BARRED FROM RECOVERY.

This accident occurred after the Amendment of 1939, that withdrew assumption of risk as a defense available to the employer in these cases.

On pages 58 and 59 of the record the Trial Judge, in explanation of the directed verdict for the defendant, said:

> "Now, it must be remembered—and we had this up for discussion while you were out,—that the plaintiff himself was the leader, and while the Railroad Company is charged with the responsibility of furnishing tools and equipment, the Railroad Company is an invisible entity, it is a corporate body that has no soul, and can only work and operate through its officers and employees, and this young man, the *plaintiff, was the man in charge of his own operation, and it was for him to say what equipment he wanted.* His lawyer, Mr. Richter, claims that the man who made the survey, the inspector, was the one who should have loaded up the truck that morning with all of the essential equipment necessary to do the job and a wire brush should have been placed in among the tools. But, the plaintiff, himself, Mr. Scarborough, says that when he got out to the job he looked around for the things with which to do the work, and that he went over to the tower, or sent someone over to the tower, to get waste and things to wipe the pipes and conduits clean, . . ." (Italics ours.)

What the Trial Judge was in effect saying was that the petitioner had assumed the risk of the job and that regardless of the inherent peril of performing the job in the established manner, or the failure of his foreman, Frankenfield to provide the brushes, if the petitioner was aware of the peril, then, if injured, he could not complain thereof.

This Court, in the *Tiller* case, supra, to use its own words, has, however, said (at page 58):

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 Amendment, and that Congress, by establishing the defense of assumption of risk in that statute, *did not mean to leave open the identical defense to the master, by changing its name to non-negligence.*" (Italics ours.)

Nor can the railroad contend that the petitioner assumed the risk of injury, since he knew that the brushes had not been supplied. Such argument is unavailing (1) because voluntary assumption of risk has been abolished as a defense under the 1939 amendment to the Employers Liability Act; *Tiller vs. Atlantic Coast Line*, 318 U. S. 54; (2) because such argument involves an admission that respondent failed to provide proper tools; (3) because in any event negligence of a fellow servant, even apart from the 1939 amendment, supports recovery even though the petitioner may have participated in the act which caused the injury: *Ill. Cent. Ry. Co. vs. Skaggs*, 36 S. Ct. 249, 240 U. S. 66 (1915); *Jones vs. Kans. City, So. Ry. Co.*, 145 S.W. 2d 969, Ark. (1941).

Further, at page 60 of the record, the learned Trial Judge said:

> "when he first started in to work he put his goggles on, and *found everything was so clean he thought he didn't need them and stopped using them. and when he came to the one in question where he got the dust in his eye he was not using the goggles,* and there were some particles of dust at this particular place. He

claims if he had a wire brush up there they would have dislodged the particles of rust, and it wouldn't have gotten in his eye. You women members of the jury know that it is a pretty good job of housekeeping when you get dust off as perfectly and accurately as that . . .

"Now, the question is whether we can, in law, charge the Railroad Company with negligence, and I can tell you as a matter of law, under the decisions and opinion of the Court, that that is not negligence in law sufficient to require the defendant to answer in damages." (Italics ours.)

By this language the learned Trial Judge charged that the petitioner was guilty of contributory negligence and that such contributory negligence was a complete bar to recovery. While not using the words "contributory negligence", he interpreted this conduct as such and then applied the effect of assumption of risk as a total deterrent to recovery. *He told the jury there was nothing the railroad could have done to have prevented this accident, and so ruled as a matter of law.* He thus held the railroad's conduct was one of non-negligence, as the petitioner was as aware of the danger as the respondent. He was thereby allowing the respondent the defense of assumption of risk though "every last vestige" of it has been removed from the law by the Amendment of 1939.

It is respectfully submitted that the reason for this misconception of the applicable legal principles arises from the failure to appropriately assess various acts of omission as negligent conduct by the respondent.

III. THE PLAINTIFF WAS ENTITLED TO A TRIAL BY JURY.

"A plaintiff has a right to a jury trial in an action for injuries when any issue of fact remains to be settled." *Robostelli vs. N.Y.R. Co.*, (C.C.A. N.Y. 1888) 33 Fed. 796.

"This amendment guarantees the right to have all questions of fact as to negligence passed upon by a jury, and the right involves not only the existence of the facts themselves, but the inferences as to the exercise of due care to be drawn from the facts when established." *Justices vs. Murray* (N. Y. 1870) 9 Wall. 278; 19 L.E. 658.

"The right of a jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Ives vs. Grand Trunk R. R. Co.*, 35 Fed. 176, Affirmed 144 U.S. 408.

The right to a jury trial to test the negligence of carriers under the Federal Employers Liability Act was unequivocally settled in the recent case of *Bailey vs. Central Vt. Ry.*, 319 U.S. 350 (1943), involving the analogous problem, whether, under given facts, the carrier had used reasonable care to provide a safe place to work. In upholding plaintiff's right to go to the jury, Justice Murphy, said;

> "The nature of the tasks which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had . . . were facts and circumstances for the jury to weigh. . . . The jury is the tribunal to decide that type of issue. . . . To withdraw such a question from the jury is to usurp its functions.
>
> "The right to a trial by jury is a basic and fundamental feature of our system of federal jurisprudence. . . . It is part and parcel of the remedy afforded railroad workers under the Employers Liability Act. Reasonable care and cause and effect are as elusive here as in the other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. . . . To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

CONCLUSION.

1. It is respectfully submitted that the petitioner has supplied adequate facts to create a jury issue.

2. The decision of the United States Circuit Court of Appeals (3rd Circuit) is in direct conflict with the decisions of this Court in the *Blair*, *Bailey* and *Tennant* cases (supra).

3. The petitioner has been deprived of his constitutional right to a trial by jury.

4. The petitioner, as one of thousands of *non-operating* employees, requires judicial expression that assumption of risk is no longer a defense as to these employees too, and that acts of omission may well constitute negligence and are not to be viewed as a form of assumption of risk under the nomenclature of non-negligence.

Respectfully submitted,

I. LOUIS RUBIN and
B. NATHANIEL RICHTER,
Attorneys for Petitioner.

SEP 15 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 355. October Term, 1945

ERNEST E. SCARBOROUGH (Plaintiff-Appellant in the Court Below),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY (Defendant-Appellee in the Court Below),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PHILIP PRICE,
R. AUBREY BOGLEY,
BARNES, DECHERT, PRICE & SMITH,
1320 Packard Building,
Philadelphia 2, Penna.,
Attorneys for Respondent.

International, 236 Chestnut St., Phila. 6, Pa.

INDEX TO BRIEF.

Page

I. Concise Statement of the Case 1

II. Argument 3

(a) There was no evidence of failure to supply adequate tools 4

(b) There was no evidence of negligence on the part of a fellow employee 7

(c) Assumption of risk was neither raised nor considered as a defense 9

(d) The evidence was not such as required submission to a jury 10

III. Conclusion 12

TABLE OF CITATIONS.

Page

Atchison, Topeka & S. F. Ry. Co. v. Toops, 281 U. S. 351 3

Brady v. Southern Ry. Co., 320 U. S. 476 4

Federal Employers' Liability Act, 45 U. S. C. A. § 51..3, 10

Patton v. Texas and Pacific Ry. Co., 179 U. S. 658 3

P. R. R. Co. v. Chamberlain, 288 U. S. 333 4

Spain v. Powell, 90 Fed. (2d) 580 4

IN THE

Supreme Court of the United States.

No. 355. October Term, 1945.

ERNEST E. SCARBOROUGH (PLAINTIFF-APPELLANT IN THE COURT BELOW),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY (DEFENDANT-APPELLEE IN THE COURT BELOW),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The question presented by the petition is whether the petitioner is entitled to have a jury find negligence on the part of a railroad company from evidence that he, an experienced employee, who was in charge of the work being done, got a speck of rust in his eye while hanging an electric fixture on a station platform, where there was no evidence of any obligation on the part of the railroad company to remove every particle of rust that might possibly fall on petitioner, and where it was admitted that petitioner was carrying around his neck at the time of the accident a pair of goggles furnished by the company and could readily have put them on if he had wished to do so.

I. Concise Statement of the Case.

Petitioner was an experienced signalman and electrician, having been employed as such since 1918 (R. 9a). On the day of the accident he was in charge of a gang (R.

10a, 48a, 49a) comprised of two other men and himself who, for about a week before the day of the accident (R. 11a, 42a), had been engaged in replacing the wiring supplying the electric fixtures under the station shed at one of the respondent's passenger stations at Bryn Mawr, Pennsylvania.

Where, in such an operation, new metal is to be placed against old, the old metal should have the rust and scale cleaned from it in order to prevent deterioration or corrosion of the new metal (R. 14a, 49a, 50a), but such cleaning operation is not designed to protect and has nothing to do with the safety of men working on the job. Although petitioner testified that this should properly have been done with a wire brush, the cleaning operation had been performed in this case with a broom, a dust brush, and some waste (R. 14a), and petitioner, who was the boss in charge of the work (R. 48a, 49a), was satisfied that these were adequate because at no time did he ask for any additional material, brushes, or anything of that sort (R. 51a), or suspend the work until they could be obtained.

At the time of the accident the new wire had been installed and everything had been done except splicing the fixture to the feed cable (R. 48a). The rust and dirt that had been underneath the old wire had been cleaned off (R. 21a), and the petitioner was standing on a ladder (R. 22a) making a splice in the wires, when he got something in his eye. He was standing with his eyes about level with the splice he was making (R. 19a), was not looking up at the time, had glasses on, was wearing a cap and had a pair of goggles, which were supplied him by the respondent, hanging around his neck (R. 40a). He said first that as he was "about to put the box cover up against the box" he felt rust and dirt coming off the box into his eye and then looked up to see where it was coming from (R. 22a). He also said that the rust was dislodged when he put or pushed the cover against the box (R. 22a, 23a, 24a). Such rust or dirt as was dislodged came either "off the box" (R. 22a)

or from the girder (R. 23a), but there was no evidence that the rust or dust came from any portion of the girder or other metal structure that was required to be cleaned in order to install the new wiring.

There was nothing to show that the rust or dust had formed on the girder rather than on the underside of the metal roof above it, and since all contacts between new metal and old had been made and all work completed except the splicing operation (R. 48a), which was done by hand with tape, there was nothing to indicate whether the speck of rust which entered petitioner's eye had come from some place which either had or should have been cleaned or from some place whose cleaning was not needed for the work being done.

Because there was no evidence to show either that the work had been improperly done, that a wire brush, if available, would have been used to clean the portion of the structure from which came the speck of rust which got into petitioner's eye, whether the speck of rust came from a part of the structure that had been cleaned or from a part that was not required to be cleaned, or that anything could have been done which would have prevented the particle from getting into petitioner's eye (R. 48a), except the use by petitioner of the goggles which he was wearing suspended about his neck (R. 40a), the Trial Judge, on motion under Rule 50, directed a verdict for the respondent, which judgment was affirmed by the Circuit Court of Appeals for the Third Circuit.

II. Argument.

In order to recover damages under the Federal Employers' Liability Act, a plaintiff must prove that the defendant was negligent and that such negligence was the cause of his injuries; *Patton v. Texas and Pacific Ry. Co.*, 179 U. S. 658, 663; *Atchison, Topeka & S. F. Ry. Co. v. Toops*, 281 U. S. 351, 354.

Where there is uncertainty as to the inferences which may fairly be drawn from the evidence, judgment must go against the party upon whom rests the necessity of showing that he is entitled to recover. *P. R. R. Co. v. Chamberlain*, 288 U. S. 333, 339; *Spain v. Powell*, 90 Fed. (2d) 580.

Perhaps the latest reaffirmance of the necessity of proving negligence and proximate cause under the Act, and the propriety of withdrawing a case from the jury in the absence of such proof, is contained in *Brady v. Southern Ry. Co.*, 320 U. S. 476, 479, 484, where it was said:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims." (p. 479)
> "Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury." (p. 484)

Petitioner relies upon two theories to sustain his petition; one, that respondent failed to supply a wire brush and that such failure was negligence, and the other, that even though it was not negligence to fail to supply such a brush, petitioner's fellow employees negligently performed the work preliminary to that done by petitioner and did not remove *every* speck of dust or rust from all the structures over the light fixture on which petitioner was working. These will be considered in the order stated.

(a) *There was no evidence of failure to supply adequate tools.*

Petitioner's argument that it was negligence to fail to supply a wire brush to clean the surfaces of the girder from

which the fixtures were suspended is based upon a misconception of the petitioner's own testimony as to the purpose for which such wire brush might have been used. The evidence shows clearly that the sole purpose of cleaning the surfaces of old metal was to make possible a smooth and even contact between old metal and any new metal that was to be fastened thereto (R. 14a, 49a, 50a) and that the necessity for such smooth contact was to protect the equipment and prevent corrosion and rust as much as possible. This cleaning process was in no sense a safety measure for the protection of workmen and was not for the purpose of preventing dust or particles of rust from falling on workmen during the course of their work. That hazard was guarded against by supplying men engaged in such work with goggles for their use in the protection of their eyes in any circumstances making such use desirable. Petitioner had been so supplied and at the time he got the speck in his eye he was wearing his goggles suspended around his neck. He accordingly had at hand a complete means of protection against the accident that happened. Not only had the respondent issued goggles to him and would have replaced any that were lost or broken (R. 42a) but petitioner was actually wearing them hung around his neck at the time of the accident (R. 40a), a place found most convenient to carry them for ready availability (R. 41a, 42a).

It is accordingly clear that the absence of a wire brush was not shown to have had anything to do with the accident. Even if it had been available, there was no evidence that it would have been used to clean the pieces of metal from which the particular piece of rust fell (there being no evidence that any new metal had been attached thereto at that point), but even if such cleaning operation might have been performed, it was readily observable by the petitioner that it had not been, and, accordingly, the sole cause of the accident was the petitioner's failure to use the goggles which he was carrying. Moreover, there was no evidence that the broom, dust brush and waste were not entirely ade-

quate for the purpose intended, namely, cleaning the small portion of the overhead beam, to which the fixture was to be attached, so that it would make a smooth contact, and not, as suggested by petitioner, removing every particle of dust or rust from the entire area beneath which petitioner was working and so eliminating the possibility of rust or dust becoming dislodged and falling or blowing into the eye of someone working beneath the shed.

The cases cited in his brief on this subject by the petitioner accordingly have no application, since there was no evidence offered to indicate that the tools supplied were not entirely adequate for the purpose for which they were intended to be used.

Petitioner was using no tools at the time he got the speck in his eye and needed none for the work to be performed. The only tool whose absence is here complained of is a wire brush, but petitioner was not using a brush and had no need to use one at the time of his accident. He was working with his hands and a piece of tape and needed nothing more to accomplish his purpose. To keep particles of dust out of his eyes he had goggles, which he had elected not to use. Cases involving the sufficiency of tools or the safety of the place provided to work are accordingly not controlling of any issue presented here.

Respondent never contended, as suggested by petitioner (p. 14), that wire brushes were usually supplied to facilitate the work and better to paint the iron work. No painting was being done here and no cleaning was either required or expected beyond the point of immediate contact between the fixture and the overhead beam, a spot of only a few square inches. Petitioner offered no evidence to indicate that such spot had not been properly cleaned to make proper contact with the fixture, but testified merely that when he pushed the cover against the box some particles of rust fell into his eye, which, except for his cap and his eyeglasses, was unprotected, because he was not wearing the goggles with which he had been supplied, and which

were hanging around his neck. Thus petitioner's statement (p. 15) that respondent "supplied no tool at all" is directly contrary to the evidence which he himself produced. The very instrument supplied by the company to petitioner to protect him from the identical injury received by him was in the immediate possession of petitioner but was not in use by him. This neglect of petitioner was the sole negligence disclosed by the evidence.

(b) *There was no evidence of negligence on the part of a fellow employee.*

It was not contended by respondent in either the District or the Circuit Courts that petitioner might not recover if his fellow employees were negligent, as suggested by the petitioner. Respondent, however, did there contend, as it does here, that there was no evidence of such negligence.

Nor was there any evidence, as suggested by petitioner, (pp. 15-16) that "a mass of more rust and dirt was dislodged" and fell on petitioner. The evidence was merely that some flakes of rust were dislodged when petitioner pushed the cover against the box over his head (R. 23a, 24a), and there is no evidence whatever from which it could be inferred that the presence of particles of rust on the overhead structures was due to any negligence of petitioner's fellow employees. There is no evidence showing the condition of the place where petitioner was working either before or after the accident or anything to indicate that what should have been cleaned was in fact not properly cleaned. The only evidence from which petitioner wishes to ask a jury to infer that it had not been properly cleaned is the fact that while petitioner was working on the third fixture a piece of dust or rust got into his eye. It cannot be assumed that this was a particle of rust which would not have been present if the portions of the beam to which new metal was to be attached had been properly cleaned with a wire brush. There is nothing to indicate that such cleaning as was required to provide a clean surface for the attach-

ment of such new metal parts as were being installed required every portion of the girder or the roof above it to be brushed down, or that every speck of rust and dust had to be removed so that by no possibility could a workman who was not using his goggles get something in his eye. Petitioner, in effect, assumes that preparing certain portions of the metal beam for the reception of new attachments really meant completely cleaning every portion, not only of the beam but of all other equipment in the immediate vicinity, not excluding the underside of the metal roof of the shelter shed.

Such assumption is wholly unjustified by any evidence in the case. An examination of the testimony, and particularly pages 14a, 49a and 50a, shows clearly that the only parts to be cleaned were those to which new metal was to be attached. There is no evidence that the rust complained of here came from such an area and, on the contrary, the petitioner testified that he saw some flakes "above the cable and on the girder above the box" (R. 22a). Where the attachment was made had been cleaned (R. 21a) and petitioner's testimony indicates that whatever rust or dust was dislodged by the petitioner in the course of his work came from a surface that did not require cleaning because no new metal was to be attached thereto.

To say, therefore, that petitioner's fellow employees failed in their duty is merely a gratuitous assumption without foundation in the evidence. Their duty cannot be held to have extended beyond the necessities of the job at hand. That did not require that every portion of the electrical and other equipment under the ceiling of the shelter shed should be completely cleaned and dusted as would a parlor table, and it is accordingly clear that petitioner's argument about the effectiveness of the cleaning operation or the sufficiency of the tools supplied for that purpose is wholly beside the point.

Petitioner merely ignores the purpose of the cleaning operation and assumes, contrary to the evidence, that it was

for the purpose of protecting employees from falling rust and dust and not, as petitioner testified (R. 49a), to protect new metal from corrosion when placed in contact with old metal. Except where such contact occurred there was no need to clean the old metal, unless it was to be painted, which was not intended here. Since rust and dust is always present on metal surfaces, exposed as were these, the men were all supplied with goggles to protect them against the risk of an accident such as that which occurred. Petitioner was wearing his around his neck instead of covering his eyes, but his failure to use the protection afforded him cannot support the charge of negligence directed against his fellow employees.

(c) *Assumption of risk was neither raised nor considered as a defense.*

A reading of the entire statement of the Trial Judge to the jury, only a portion of which is quoted by petitioner (p. 18), shows that it was merely a conversational explanation to the jury that they had no further duties in the case. It was not a legal opinion, nor intended to be, nor did it purport to instruct the jury on the law of the case. No motion for a new trial was filed and no attempt was made by petitioner to secure an expression of the formal opinion of the District Court supporting its action. Neither assumption of risk nor contributory negligence was discussed or considered as a defense. A verdict was directed for respondent on respondent's motion, which was based solely on the absence of any evidence of negligence on the part of the respondent or its employees (R. 54a), and it is clear that this was the sole factor which moved the Court to direct the verdict because the Trial Judge stated the question to be (R. 60a) whether he could "charge the Railroad Company with negligence." That he resolved this question in favor of the respondent and accordingly felt bound to direct the verdict furnishes no justification for petitioner's present contention that he "in effect" decided the case on assumption of

risk and contributory negligence. No such gratuitous assumption can be made to supply a foundation for an application for a writ of certiorari.

The suggested distinction between operating and non-operating employees appeared for the first time in this case on p. 8 of the petitioner's brief in this Court, and it is manifestly without substance. No such distinction exists under the Federal Employers Liability Act. Respondent admitted in its answer to the complaint (R. 5a) that petitioner was engaged in interstate commerce and that the action arose under that act and at no time during the course of the proceedings in the Courts below did anyone even suggest that such a distinction existed. It is clear that it does not, and no decision of this Court is needed to declare anything so obvious.

(d) *The evidence was not such as required submission to a jury.*

Petitioner cites a number of cases in support of the proposition that disputed questions of fact must be submitted to a jury. Neither the respondent nor either of the Courts below questioned this proposition or the authority of any of the cases referred to by the petitioner. That question is not involved in this case. Nor is there any conflict between the decision of the Circuit Court and the four cases chiefly relied on by petitioner and cited on p. 8 of his brief.

In the *Blair* case the plaintiff was injured while unloading 10-inch seamless steel tubes, approximately 30 feet long and weighing slightly more than 1000 pounds each. The pipes were greased and slick and plaintiff objected to his superior that they could not be properly handled with the equipment available, a "nose truck" of the kind commonly used in railroad stations to move freight and baggage. He was ordered to proceed and in the course of the operation one of the pipes slipped and plaintiff was injured. In that

case it was accordingly clear that the inadequacy of the equipment was directly responsible for the accident.

In the *Bailey* case the plaintiff's decedent, unskilled and perhaps unfamiliar in the opening of hopper cars, was required to stand beside a hopper car, which itself was on a bridge 18 feet above the ground below, and release the doors of the car by putting tension on a shaft by means of a wrench. As the doors were released the weight of the material in the car, which was cinders, opened the doors and the wrench would accordingly spin unless immediately disengaged. Bailey's only available footing was about 12 inches wide and there was no guard-rail on the bridge, so that the least mis-step or loss of balance would cause him to fall off the bridge. It also appeared that the intended purpose could have been accomplished by dumping the cinders before the car had been placed on the bridge. Clearly, Bailey was engaged in an inherently dangerous operation and this Court held that it was for the jury to say whether the employer had used reasonable care in furnishing a safe place to work.

In the *Pederson* case the only question considered was whether the plaintiff was engaged in interstate commerce, a fact which was admitted in the pleadings in the present case.

In the *Tennant* case a member of a switching crew was killed at night when run over by a train which was moved without a prior ringing of the engine bell, in violation of a rule of the company requiring the bell to be rung "when an engine is about to move." It was held that such violation of its own rule constituted sufficient evidence of defendant's negligence to support a finding by the jury that the rule was for the protection of the deceased and that its admitted non-observance was the proximate cause of the accident.

The facts of the foregoing cases make clear their inapplicability to this case. Here there were no tools either shown or thought by anyone to be inadequate for the purpose intended, no work to be done which had the slightest

appearance of danger, and no violation of any rule or practice designed to protect the petitioner. The injury was caused by petitioner getting a speck of rust in his eye from some unidentified portion of the structures under which he was working, a hazard against which the respondent had provided protection for all its employees by furnishing them with goggles. That petitioner rejected such protection and chose to wear his goggles hanging around his neck should not make his employer responsible in damages for the consequence of his so doing.

III. Conclusion.

It is respectfully submitted, therefore, that the petition for certiorari should be denied.

Respectfully submitted,

PHILIP PRICE,
R. AUBREY BOGLEY,
Attorneys for Respondent.

FILED
OCT 12
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

TERM, 1945

No. 355

ERNEST E. SCARBOROUGH,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
A CORPORATION,

Respondent.

PETITION AND BRIEF OF THE UNITED RAILROAD WORKERS OF AMERICA, C.I.O., FOR LEAVE TO FILE THE SAME, AMICUS CURIAE.

LEE PRESSMAN
FRANK DONNER
Counsel for United Railroad Workers of America.

IN THE

Supreme Court of the United States

TERM, 1945

No. 355

ERNEST E. SCARBOROUGH,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
A CORPORATION,

Respondent.

PETITION AND BRIEF OF THE UNITED RAILROAD WORKERS OF AMERICA, C.I.O., FOR LEAVE TO FILE THE SAME, AMICUS CURIAE.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Ernest E. Scarborough, by his attorneys, has prayed that a writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled case on May 24, 1945. The United Railroad Workers of America, C.I.O., ask leave to file a brief, amicus curiae, because of the severe precedent this decision may have on cases hereinafter to be tried, affecting the rights of millions of other non-operating railroad employees similarly situated.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania is not reported.

The opinion of the United States Circuit Court of Appeals (R. 67) is reported in 149 Fed. 2d, 636.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 24, 1945 (R. 67). The jurisdiction of this Court is involved under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U.S.C.A., Sec. 347 (a).

QUESTIONS PRESENTED

1. Did the ruling of the Court below, holding there was no evidence of actionable negligence, as a matter of law, deprive the petitioner of his constitutional right to a trial by jury?

2. Was the action of the Court below erroneously predicated on an application of the principles of assumption of risk no longer available as a defense in these cases?

CONSTITUTION AND STATUTE INVOLVED

The Seventh Amendment to the Constitution of the United States which in its pertinent parts provides:

> "In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

The Federal Employers Liability Act as amended (45 U.S.C. 51) which provides in part:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

STATEMENT OF THE FACTS

The petitioner who had no duty to supply his own tools, nor to specify what tools were needed, arrived at Bryn Mawr Station on April 21, 1941, with several other employees, with

directions to remove the old wiring and lighting fixtures and to replace the same. A specific order required that the beam and other surface parts on or near the roof, to which new material was to be affixed, were to be cleaned carefully and freed of all rust.

Actually, neither the usual nor any rust cleaning tools were provided by the petitioner's superiors. The petitioner was not the foreman on the job. As gang leader he found an old broom and some waste with which he and his co-workers cleaned fixtures I and II. *The petitioner had nothing whatsoever to do with cleaning the beam around fixture III.* His co-workers *alone* undertook to remove the rust around it.

By the slightest application by the petitioner of pressure on the cover of that receptacle box, he was showered by rust around that light, supposedly previously cleaned by his fellow employees, but actually not cleaned at all. This rust caused the petitioner to lose all vision in one eye.

The petitioner contends that this accident occurred because—

(a) he and his fellow employees were not supplied with the usual proper rust-removing tools, or

(b) if what was used was adequate, there was evidence of improper rust removal by his fellow employees.

SPECIFICATIONS OF ERROR TO BE URGED

1. The right to a jury trial was typically emasculated by the ruling in this case.

2. The decision of the Court below is in direct conflict with the statute as interpreted by the recent cases of *Blair* v. *B. & O. R. R. Co.*, 323 U. S. 600; *Bailey, Admnx.* v. *Central of Vermont*, 319 U. S. 350; *Tennant* v. *Peoria & P. V. Ry. Co.*, 321 U. S. 29.

3. This decision vitally affects the rights of over sixty-five thousand *non-operating* railroad employees of this defendant alone, as well as several millions similarly situated with the other interstate carriers in the country. The Amendment of 1939 has drawn shopmen, carmen, machinists, moulders, electricians, plasterers, and workers of dozens of other crafts into

its purview since their work is sometimes of an interstate nature. The comment of the trial court (the only judicial expression indicating the rationale of the ruling) indicates that the ruling of this Court in *Tiller* v. *Atlantic Coast Line*, 318 U. S. 54, removing every last vestige of assumption of risk as defense in whatever form it might be presented, has been ignored or misinterpreted. This decision, depriving this non-operating employee of all recovery, will serve as a devastating blow to this class of workers, especially since the Third Circuit is in Philadelphia, the home of the defendant and the trial forum for the great majority of these claims brought by members of this labor organization.

CONCLUSION

The writ should be granted.

Respectfully submitted,

LEE PRESSMAN
FRANK DONNER
Counsel for United Railroad Workers of America, C.I.O.

BRIEF

This brief has been prepared, not merely because of the injustice believed done the petitioner, but because the decision may become an insurmountable obstacle to recovery by thousands of injured non-operating employees who will have to rely on proof of negligence of the same kind and character as here offered by the petitioner.

Makeshift tools ill fit for performance of the work directed, practices hazardous of themselves without necessity, structures and appliances so arranged as to create unreasonable peril, and operations without adequate regulation by safety rules that the railroad itself should have promulgated; all give rise to a terrible accident toll that brings unnecessary suffering to thousands of railroad families.

Whether these various factual situations constitute negligence should be for exclusive jury consideration in the light of the applicable legal principles enunciated in the several cases

decided by this Court since the first *Tiller* case. (*Tiller* v. *Atlantic Coast Line*, 318 U. S. 54.)

Necessarily here negligence takes on a more sophisticated guise. A positive act of commission is naturally more easily recognized than a complex passive state of affairs wherein the act is one of omission. Though the decision in the latter case is more difficult, nevertheless, it is still a decision as to a factual situation. As such it is for the jury. Railroad employees must not be deprived of their right to a trial by jury merely because a judge thinks he could more easily decide the case, or even more correctly. To do so is to have judicial usurpation of the jury function. *Bailey* v. *Central of Vermont Rwy. Co.*, 319 U. S. 350.

Judicial conduct to the contrary is, however, frequently based on the thought that since the employer need not furnish the most efficient, the safest or best appliance (*Chicago & N. W. R. R. Co.* v. *Bowers*, 241 U. S. 470), but merely one reasonably safe, whether the appliance supplied or the procedure followed is reasonably safe, becomes a question of law and not fact.

Proof that other railroads use the same tool or follow the same practices, as those complained of, in some judicial minds, as in the Court below, seems to be adequate proof of the absence of negligence warranting a ruling to that effect as a matter of law.

In effect, this all means that since the injured employee is as aware as the railroad of the hazard and peril, he has assumed that risk by accepting the job or using the tool in question, or doing the work without such tools as should properly have been supplied.

Such courts, however, do not call it assumption of risk. They call it "non-negligence". This practice was decried in the *Tiller* case, *supra*. As was pointed out in that case, the Court said,

> "In the disposition of cases the question of the plaintiff's assumption of risk has frequently been treated simply as another way of appraising defendant's negligence, as was done by the court below in the instant case.

"It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employee from the burden of assumption of risk by whatever name it was called. The result is an act which requires cases tried under the Federal Act to be handled as though no doctrine of assumption of risk had ever existed."

In the same opinion, in note 21, the Court said:

"The present rule apparently ignores the fact that the master, and not the servant, has control of the conditions which affect the safety of the employees. . . . The existing rule not only permits the employer to be careless about the condition of his premises, but, in effect, places a premium upon his carelessness. . . .

"Under present economic conditions employees must, of necessity, continue to work under unsafe conditions or frequently sacrifice the fruits of many years of accumulated seniority, go on relief, or beg their bread."

In the 1939 Senate Committee Report to this amendment we find,

"In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances."

Illustrative of typical accidents in which non-operating employees sustain injury are the following three:

A. A roundhouse employee in replacing a casing head, weighing eighty pounds, on an engine cylinder does a job assigned to a single machinist. He must lift it 2½ ft. high and set it on a protusion 4 in. long and 2 ft. away from the platform he works on. The casing head has no handle or grip by which it may be held. The practice is universal in all railroads.

QUERY: Where an employee thereby suffers an inguinal hernia, is it for the jury to decide whether the employee was required to do more than should have been reasonably expected of one man?

B. A stower who loads freight cars at night is directed to hammer nails into car door jambs on which to hang electric cord. He necessarily hammers in the dark, misses the nail, and it causes loss of an eye. The procedure is universal on railroads. Simple, permanent, three-cent line hooks could have been installed, obviating just such peril.

QUERY: Is this practice so hazardous, though employee is aware of it, that a jury might find in it actionable negligence?

C. The universal practice on electrified railroads is to reinstate power immediately on catenary lines that have been short circuited because of a foreign object touching the trolley overhead line or a defect in some equipment, without investigating the cause of the power outage. In only four out of two thousand cases are humans involved.

QUERY: Is it a judicial or a jury's function to weigh this conduct for negligence, despite its universal practice?

The record at hand indicates an order to clean overhead work of rust without providing *any* of the usual tools for such work. *Clearly anticipatable* by the employer was the fact that some employee would work below that point and apply pressure there, relying on the rust having been previously removed so that he would not be subjected to the risk of a shower of rust coming onto his face.

This certainly presented a jury issue under the decision in *Blair* v. *B. & O. R. R. Co.*, 323 U. S. 600. Intertwined with this factual situation is the otherwise inevitable conclusion that, if the waste found and used by the fellow employees to clean the fixture in question was adequate to clean it properly, then such fellow employees were negligent in their work and proximately caused the injury. *Union Pacific R. R. Co.* v. *Hadley*, 246 U. S. 330.

To deprive the petitioner of a jury trial in the instant case necessarily precludes jury trials in the thousands of cases comparable to those illustrated.

To do so is to put these people back into the dark economic ages where injured employees and families of fatally injured employees were left destitute and economic charges on the

community instead of placing the burden of their care on the industry responsible for their plight.

The petition for certiorari, it is respectfully submitted, should be granted and the case remanded for trial to a jury.

Respectfully submitted,

LEE PRESSMAN
FRANK DONNER
Counsel for United Railroad Workers of America, C.I.O.
Amicus Curiae.

IN THE

Supreme Court of the United States

TERM, 1945

No. 355

ERNEST E. SCARBOROUGH,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,

A CORPORATION,

Respondent.

PETITION FOR RE-HEARING FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS (3RD) BY ERNEST E. SCARBOROUGH

JOHN HENDERSON HOFFMAN,
I. LOUIS RUBIN,
B. NATHANIEL RICHTER,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

TERM, 1945

No. 355

ERNEST E. SCARBOROUGH,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
A CORPORATION,

Respondent.

PETITION FOR RE-HEARING FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS (3RD) BY ERNEST E. SCARBOROUGH

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

HISTORY OF THE CASE

This case was before the United States Supreme Court on October 15, 1945, on Petition for Writ of Certiorari. The petition was denied. Mr. Justice Black, Mr. Justice Murphy, and Mr. Justice Douglas were of the opinion that the certiorari should be granted. The motion of the Congress of Industrial Organizations for leave to file a brief, amicus curiae, was granted.

BRIEF

This case was before the Court on petition by Ernest E. Scarborough for certiorari. On October 15, 1945, the following opinion was rendered, denying certiorari:

> "The petition for writ of certiorari in this case is denied. Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy are of the opinion that the petition for certiorari should be granted because of conflict with *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54. The motion of the Congress of Industrial Organizations for leave to file a brief amicus curiae is granted."

To the petitioner herein, the refusal of certiorari means the denial of a day in court before a jury of his peers, assured to him by the Constitution of the United States. The petitioner believes that under the Federal Employers Liability Act, 45 U.S.C.A. 51, et seq., as interpreted by the case of *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54, he has established facts sufficient to create a jury issue.

To the petitioner the refusal of certiorari comes as a blunt and staggering blow. When this petition was filed it was done only after careful study of what this Court said in *both* the majority and dissenting opinions in *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350. Convinced that the action of the Court below was in direct conflict with *Tiller* v. *Atlantic Coast Line Railroad Co.*, supra, its brief was not filed solely because of the utter conviction that the case was wrongly decided. Having applied the extraordinarily severe formula laid down by Mr. Justice Roberts in his dissent in *Bailey* v. *Central Vermont R. Co.*, supra, on when certiorari should be granted, this case measured up fully to even those tests.

Mr. Justice Roberts there said:

> ". . . While the legal principles binding alike on court and jury in such actions are, for the most part, settled, the complexes of fact to which these principles are applica-

ble rarely are identical in any two litigations. If, in every case where, peradventure, this court might differ from a lower court in appraising the *legal effect* of the proofs adduced by plaintiff or defendant, we independently review the facts to determine whether there was evidence for a jury's consideration, we shall reverse a course founded in over fifty years of history . . .

". . . And so the policy of the court has been to abstain from taking a case even though it thought it erroneously decided below, whether on an issue of law or fact, if the decision did not involve an important question of law, did not create a diversity of decision in lower courts, or would not seriously affect the administration of the law in other cases. *And this has been especially so where a decision below recognized the controlling legal principles but was claimed to have applied them improperly to the specific facts disclosed.*" (Italics supplied.)

The instant case is not one where the legal effect of the proofs was misappraised. The decision below did not recognize the controlling legal principles at all. It cannot, with any logic, be argued that they were merely improperly applied.

The only judicial comment uttered in the case shows a total lack of understanding of the *Tiller* case, supra, the effect of the removal of assumption of risk as a defense, and its review of the multiple guises in which it had repeatedly previously appeared in the decisions. It cannot be contended, by any stretch of the imagination, that in what had been judicially said below, was there any recognition of the "controlling legal principles." *A fortiori,* then, if we use the test for granting certiorari laid down by the majority of the Court in the *Bailey* case, supra, certiorari should here have been granted.[1]

The Federal Employers Liability Act, 45 U.S.C.A. 51 et seq. does not distinguish between operating and non-operating employees. The sole requirement any injured railroad employee need meet to come within the purview of this act is to

---

[1] On deprivation of the right to trial by jury by misapplication of the controlling legal principles.

establish the interstate character of his work in the light of the amendment of August 11, 1939 c. 685, Sec. 1, 53 Stat. 1404.

Now this decision in this case has set apart *in practical effect* non-operating employees from operating employees. The intrinsic nature of the work done by non-operating employees, the characteristic pattern of the accidents which befall them,[2] the difficulties of proof because negligence here generally results from acts of omission rather than commission, all necessarily will be a part of every other suit for damages brought by a non-operating employee.

This decision places before these employees an extra obstacle not contemplated by Congress which intended to help alike *all* railroad employees engaged in interstate commerce.

With certiorari here denied, to whom now shall this vast army of employees turn for correction of this problem? Certainly not to Congress,[3] as Congress has already done all it could conceivably have done within the framework of an act that undoubtedly has features highly superior to ordinary workmen's compensation law.

By this decision, it is respectfully submitted, remedial legislation has been subverted by judicial action. Only by granting a writ of certiorari and proper application of the law, as enunciated in the *Tiller* case, supra, to the facts in this case can the non-operating employee also be given the protection intended by Congress. The refusal of certiorari here as surely deprives these employees of that protection as the adoption of the view of the learned dissenting judge in the *Tiller* case would have deprived all interstate railroad employees thereof. The comments of the learned trial judge and the per curiam affirmance by the learned Judges of the Circuit Court of Appeals[4] are at one with the reasoning of the dissenting opinion in the *Tiller* case. Refusal of certiorari here as effectively adopts that rea-

---

[2] Previously described in original brief.

[3] To whom courts generally refer litigants for remedial legislation.

[4] The presiding judge was also a member of the Court that twice ruled on the *Tiller* case.

soning[5] as could have been achieved by direct reversal of the *Tiller* decision.

This we regretfully conclude with full recognition of the principle that refusal of certiorari does not always mean approval of the opinion below.

CONCLUSION

1. By proper application of the principles enunciated in *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54, the case should have been submitted to the jury. The action of the court below was in direct conflict with the cited case.

2. Certiorari should be granted when the court below fails to apply properly the controlling legal principles involved; especially is this true when, as in the instant case, the Court below failed to recognize the problem at all. Conflict ensues between the action of this Court on the previous petition for certiorari and what all nine justices recognized as a proper basis for allowing certiorari in *Bailey* v. *Central Vermont Railroad Co.*, 319 U. S. 350, and *Deputy* v. *Dupont*, 308 U. S. 488, 499, even as to its dissenting opinion.

3. The effect of refusal of certiorari here transcends what will happen to the immediate injured employee. It directly affects every non-operating railroad employee. The avenue of succor, intentionally widened to its utmost by Congress to benefit all interstate employees, has now been narrowed by judicial ruling to benefit only operating employees. Congress could not have spoken more plainly to the contrary. It is respectfully submitted that the law of this case as it now stands is without legislative sanction and beyond correction by new legislation.

Respectfully submitted,

JOHN HENDERSON HOFFMAN,
I. LOUIS RUBIN,
B. NATHANIEL RICHTER,
Counsel for Petitioner.

---

[5] Since the controlling principles of the majority opinion in the *Tiller* case are expressly challenged.